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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

TIMOTHY BERTRAM,

 Plaintiff,

 v.

T. VIRGA,

 Defendant.

No. 2:13-cv-1452-TLN-EFB P

SCREENING ORDER AND ORDER
GRANTING IFP

Plaintiff is a former state prisoner proceeding without counsel in an action brought under 42 U.S.C. § 1983. In addition to filing a complaint, plaintiff has filed an application to proceed in forma pauperis and a request for appointment of counsel.

I. IFP Application

Plaintiff has submitted the affidavit required by § 1915(a) showing that he is unable to prepay fees and costs or give security therefor. Accordingly, the request to proceed in forma pauperis will be granted. 28 U.S.C. § 1915(a).

II. Appointment of Counsel

Plaintiff requests that the court appoint counsel. District courts lack authority to require counsel to represent indigent prisoners in section 1983 cases. *Mallard v. United States Dist. Court*, 490 U.S. 296, 298 (1989). In exceptional circumstances, the court may request an attorney to voluntarily to represent such a plaintiff. *See* 28 U.S.C. § 1915(e)(1); *Terrell v. Brewer*, 935

1 F.2d 1015, 1017 (9th Cir. 1991); *Wood v. Housewright*, 900 F.2d 1332, 1335-36 (9th Cir. 1990).
2 When determining whether “exceptional circumstances” exist, the court must consider the
3 likelihood of success on the merits as well as the ability of the plaintiff to articulate his claims pro
4 se in light of the complexity of the legal issues involved. *Palmer v. Valdez*, 560 F.3d 965, 970
5 (9th Cir. 2009). Having considered those factors, the court finds there are no exceptional
6 circumstances in this case.

7 **III. Screening Requirement and Standards**

8 Federal courts must engage in a preliminary screening of cases in which prisoners seek
9 redress from a governmental entity or officer or employee of a governmental entity. 28 U.S.C.
10 § 1915A(a). The court must identify cognizable claims or dismiss the complaint, or any portion
11 of the complaint, if the complaint “is frivolous, malicious, or fails to state a claim upon which
12 relief may be granted,” or “seeks monetary relief from a defendant who is immune from such
13 relief.” *Id.* § 1915A(b).

14 A pro se plaintiff, like other litigants, must satisfy the pleading requirements of Rule 8(a)
15 of the Federal Rules of Civil Procedure. Rule 8(a)(2) “requires a complaint to include a short and
16 plain statement of the claim showing that the pleader is entitled to relief, in order to give the
17 defendant fair notice of what the claim is and the grounds upon which it rests.” *Bell Atl. Corp. v.*
18 *Twombly*, 550 U.S. 544, 554, 562-563 (2007) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).
19 While the complaint must comply with the “short and plain statement” requirements of Rule 8,
20 its allegations must also include the specificity required by *Twombly* and *Ashcroft v. Iqbal*, 129 S.
21 Ct. 1937, 1949 (2009).

22 To avoid dismissal for failure to state a claim a complaint must contain more than “naked
23 assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause of
24 action.” *Twombly*, 550 U.S. at 555-557. In other words, “[t]hreadbare recitals of the elements of
25 a cause of action, supported by mere conclusory statements do not suffice.” *Ashcroft v. Iqbal*,
26 129 S. Ct. at 1949.

27 Furthermore, a claim upon which the court can grant relief must have facial plausibility.
28 *Twombly*, 550 U.S. at 570. “A claim has facial plausibility when the plaintiff pleads factual

1 content that allows the court to draw the reasonable inference that the defendant is liable for the
2 misconduct alleged.” *Iqbal*, 129 S. Ct. at 1949. When considering whether a complaint states a
3 claim upon which relief can be granted, the court must accept the allegations as true, *Erickson v.*
4 *Pardus*, 127 S. Ct. 2197, 2200 (2007), and construe the complaint in the light most favorable to
5 the plaintiff, *see Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

6 **IV. Screening Order**

7 The court has reviewed plaintiff’s complaint (ECF No. 1) pursuant to § 1915A and
8 concludes that it must be dismissed with leave to amend for failure to state a claim upon which
9 relief may be granted. To proceed, plaintiff must file an amended complaint.

10 Plaintiff names Warden Virga and “Doe” mailroom staff as defendants. He alleges that on
11 June 20, 2010, he gave “confidential legal mail” to a prison official for mailing “to the courts and
12 a lawyer.” Nearly two years later, on April 20, 2012, plaintiff apparently received a memo from
13 defendant Warden Virga, informing plaintiff that his “outgoing legal mail was never delivered”
14 because “someone in the mailroom held onto [it].” As a result plaintiff claims that he “lost [his]
15 appeal rights in 2 cases” and “lost [his] parental rights.” Plaintiff does not identify the particular
16 employee who allegedly held onto his mail for nearly two years. Nor does he allege how
17 defendant Virga was involved in the alleged violation of plaintiff’s rights. In addition, plaintiff
18 does not describe the nature of the two appeals he allegedly lost – that is, whether they were
19 direct criminal appeals, constitutional challenges to his conditions of confinement, family law
20 matters, or some other type of proceeding.

21 In order to state a claim under § 1983, a plaintiff must allege: (1) the violation of a federal
22 constitutional or statutory right; and (2) that the violation was committed by a person acting under
23 the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988); *Jones v. Williams*, 297 F.3d
24 930, 934 (9th Cir. 2002). An individual defendant is not liable on a civil rights claim unless the
25 facts establish the defendant’s personal involvement in the constitutional deprivation or a causal
26 connection between the defendant’s wrongful conduct and the alleged constitutional deprivation.
27 *See Hansen v. Black*, 885 F.2d 642, 646 (9th Cir. 1989); *Johnson v. Duffy*, 588 F.2d 740, 743-44
28 (9th Cir. 1978). That is, plaintiff may not sue any official on the theory that the official is liable

1 for the unconstitutional conduct of his or her subordinates. *Ashcroft v. Iqbal*, 129 S. Ct. 1937,
2 1948 (2009). Because respondeat superior liability is inapplicable to § 1983 suits, “a plaintiff
3 must plead that each Government-official defendant, through the official’s own individual
4 actions, has violated the Constitution.” *Id.* It is plaintiff’s responsibility to allege facts to state a
5 plausible claim for relief. *Iqbal*, 129 S. Ct. at 1949; *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969
6 (9th Cir. 2009).

7 Prisoners have a First Amendment right to send and receive mail. *See Witherow v. Paff*,
8 52 F.3d 264, 265 (9th Cir. 1995) (per curiam). However, an isolated incident of mail interference
9 or tampering is usually insufficient to establish a constitutional violation. *Davis v. Goord*, 320
10 F.3d 346, 351 (2d Cir. 2003); *see also Crofton v. Roe*, 170 F.3d 957, 961 (9th Cir. 1999)
11 (temporary delay or isolated incident of delay of mail does not violate a prisoner’s First
12 Amendment rights); *Witherow*, 52 F.3d at 266 (9th Cir. 1995) (First Amendment not violated
13 where prison’s mail regulation related to a legitimate penological interest).

14 Prisoners have a constitutional right of access to the courts. *Bounds v. Smith*, 430 U.S.
15 817, 828 (1977). Prisoners also have a right “to litigate claims challenging their sentences or the
16 conditions of their confinement to conclusion without *active interference* by prison officials.”
17 *Silva v. Di Vittorio*, 658 F.3d 1090, 1103 (9th Cir. 2011). An inmate alleging a violation of this
18 right must show that he suffered an actual injury. *Lewis v. Casey*, 518 U.S. 343, 349-51 (1996).
19 That is, plaintiff must allege that the deprivation actually injured his litigation efforts, in that the
20 defendant hindered his efforts to bring, or caused him to lose, an actionable claim challenging his
21 criminal sentence or conditions of confinement. *See id.* at 351; *Christopher v. Harbury*, 536 U.S.
22 403, 412-15 (2002).

23 The complaint also names Doe defendants. The use of Doe defendants in federal court is
24 problematic, *see Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980), and ultimately
25 unnecessary. Rather, the Federal Rules of Civil Procedure prescribe the process plaintiff must
26 follow if he wishes to add as defendants subsequently identified individuals. Should plaintiff
27 learn the identities of parties he wishes to serve, he must promptly move pursuant to Rule 15 of
28 the Federal Rules of Civil Procedure to file an amended complaint to add them as defendants.

1 *See Brass v. County of Los Angeles*, 328 F.3d 1192, 1197-98 (9th Cir. 2003). If the timing of his
2 amended complaint raises questions as to the statute of limitations, plaintiff must satisfy the
3 requirements of Rule 15(c), which is the controlling procedure for adding defendants whose
4 identities were discovered after commencement of the action. Additionally, unknown persons
5 cannot be served with process until they are identified by their real names and the court will not
6 investigate the names and identities of unnamed defendants.

7 Plaintiff will be granted leave to file an amended complaint, if plaintiff can allege a
8 cognizable legal theory against a proper defendant and sufficient facts in support of that
9 cognizable legal theory. *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc)
10 (district courts must afford pro se litigants an opportunity to amend to correct any deficiency in
11 their complaints). Should plaintiff choose to file an amended complaint, the amended complaint
12 shall clearly set forth the claims and allegations against each defendant. Any amended complaint
13 must cure the deficiencies identified above and also adhere to the following requirements:

14 Any amended complaint must identify as a defendant only persons who personally
15 participated in a substantial way in depriving him of a federal constitutional right. *Johnson v.*
16 *Duffy*, 588 F.2d 740, 743 (9th Cir. 1978) (a person subjects another to the deprivation of a
17 constitutional right if he does an act, participates in another's act or omits to perform an act he is
18 legally required to do that causes the alleged deprivation). It must also contain a caption
19 including the names of all defendants. Fed. R. Civ. P. 10(a).

20 Any amended complaint must be written or typed so that it so that it is complete in itself
21 without reference to any earlier filed complaint. L.R. 220. This is because an amended
22 complaint supersedes any earlier filed complaint, and once an amended complaint is filed, the
23 earlier filed complaint no longer serves any function in the case. *See Forsyth v. Humana*, 114
24 F.3d 1467, 1474 (9th Cir. 1997) (the ““amended complaint supersedes the original, the latter
25 being treated thereafter as non-existent.””) (quoting *Loux v. Rhay*, 375 F.2d 55, 57 (9th Cir.
26 1967)).

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1 Finally, the court cautions plaintiff that failure to comply with the Federal Rules of Civil
2 Procedure, this court's Local Rules, or any court order may result in this action being dismissed.
3 *See* E.D. Cal. L.R. 110.

4 **V. Conclusion**

5 Accordingly, the court hereby orders that:

- 6 1. Plaintiff's request to proceed in forma pauperis is granted.
- 7 2. Plaintiff's request for appointment of counsel (ECF No. 8) is denied.
- 8 3. The complaint is dismissed with leave to amend within 30 days. The amended
9 complaint must bear the docket number assigned to this case and be titled "First Amended
10 Complaint." Failure to comply with this order will result in this action being dismissed for failure
11 to state a claim. If plaintiff files an amended complaint stating a cognizable claim the court will
12 proceed with service of process by the United States Marshal.

13 Dated: November 5, 2013.

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15 EDMUND F. BRENNAN
16 UNITED STATES MAGISTRATE JUDGE
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